

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be argued by:
STANLEY SCHIMMEL, Esq.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-1250

B 7cc
P/S

UNITED STATES OF AMERICA,
Appellee

-against-

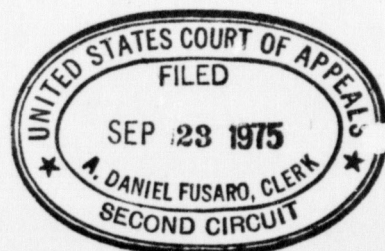
Docket #75-1250

RICHARD THRASHER,
Appellant.

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTION PRESENTED

Whether there are any non-frivolous issues to
be raised for this Court's review.

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler), entered on June 27, 1975, convicting appellant Richard Thrasher of conspiracy in violation of Title 21, U.S.C., Sections 173, 174, 812, 841(a) and 841(b)(1)(A) and violation of Title 21, U.S.C., Sections 173 and 174 and Title 18, U.S.C., Section 2., and sentencing him to concurrent ten year terms of imprisonment and a fine of \$10,000.

This appeal is being prosecuted and counsel has been assigned pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

According to the government's two primary witnesses, Donald James and Nancy Marbury, Richard Thrasher and his thirteen co-defendants had participated with them in a multi-million dollar heroin distribution venture. Together with defendant Robert Ray Daniels, James had been a founding partner in the operation. Through her narcotics addiction, Nancy Marbury had become the girl friend of Donald James. During the life of the conspiracy she, like James worked on the sale and distribution of heroin on an almost daily basis. The testimony of these two witnesses concerning the general organization and operation of the venture may be briefly summarized as follows:

Ray Daniels and Donald James were partners in the continuing purchase of large quantities of almost pure heroin. Richard Thrasher was one of four men who supplied heroin to the conspiracy.

After a package of heroin, usually weighing between one half to five kilograms of heroin, was delivered it would be taken to a "factory". There it would be "cut" or mixed with other substances for the purpose of diluting it.

At the completion of the cutting process the end product was placed into small glassine envelopes. These envelopes were then grouped into "bundles"--packages of twenty five envelopes secured by rubber bands.

"Workers" or street sellers were then provided with bundles from which they sold individual envelopes to street addicts.

The "lieutenants" of Daniels and James were responsible for distributing the bundles to the workers, collecting the proceeds of the sales and arranging for the "re-up" or resupply of the workers.

In support of the testimony of James and Marbury, the government introduced into evidence several volumes of books and records. James and other members of the conspiracy maintained these volumes as business records. The meaning of the various entries were explained in detail as they related to the business of selling heroin.

Some of the volumes related to the workers and contained their names, addresses, phone numbers, quantities of bundles delivered and payments made on consignment. Other books related to the addicts being serviced, including their numbers and the amounts of heroin being supplied on a daily basis.

Additional testimony as to the operation was provided by undercover officer Kenneth Bernhardt. While purchasing heroin from the operation, Bernhardt engaged in conversation with defendant Larry Stewart. During the course of

those discussions, Stewart provided both corroborative and additional information relating to the methods of operation and areas of responsibility and power. (Trial Transcript, hereafter "Tr...", 1617-1624).

The government also introduced wiretap evidence covering calls from workers requesting re-supply or discussing arrangements to be made for it.

In contrast to the government's voluminous presentation regarding the general operation of the conspiracy, the evidence dealing with Richard Thrasher's participation in that venture was quite limited:

James purchased heroin from Thrasher on rare occasions during 1971. (Tr. 580). The purchases totalled approximately seven kilograms. (Tr. 604).

Thrasher had referred them to a house to be used as a "bag-up spot" in "about 1971". (Tr. 169-170).

In April, 1971, James made arrangements to sell one eighth of a kilogram to Kenneth Bernhardt. After discussing the prospective sale with Ray Daniels in the presence of John Bryant, James obtained the heroin from Thrasher in the bathroom of a bar located in Brooklyn. James gave this package to Larry Stewart who delivered it to Bernhardt. The latter handed a sum of money to Stewart who gave it to James. (Tr. 574-579).

Nancy Marbury testified that during a "bag-up" at the home of "Charlie Brown's mother", Thrasher walked in. Ray Daniels then complained that a package of heroin wasn't of the high quality which Thrasher had claimed for it. As a result the heroin couldn't "stand the cut" which Thrasher said it would. Thrasher said nothing. (Tr. 1395-1396).

STATEMENT OF POSSIBLE LEGAL ISSUES

1. Effective assistance of counsel

On April 17, 1975, Thrasher's attorney requested a severance as to his client. This motion was based on the fact that counsel had been absent during a portion of the trial. A state trial in which counsel had been engaged had lasted longer than anticipated, making it impossible for the attorney to be present on Thrasher's behalf. (Tr. 483).

This motion for a severance was denied, the trial judge ruling that counsel, with Thrasher's consent, had arranged for the representation of Thrasher by one of the attorneys who was representing a co-defendant at the trial. This arrangement, which several of the other trial attorneys had also entered into, had been permitted by the court as an accommodation to the lawyers who had other commitments from time to time. (Tr. 483-487).

The 6th Amendment to the Constitution of the United States clearly guarantees every criminal defendant the right to the effective assistance of counsel. Under the circumstances of this case it appears that that right was not violated and that the trial court's ruling was clearly correct.

Richard Thrasher was represented by retained counsel. When Thrasher's trial was commenced on April 14, 1975, his attorney was on trial in a state court. With Thrasher's knowledge and consent his attorney arranged for the attorney of a co-defendant to represent Thrasher until the state trial had been concluded.

Before Thrasher's trial was begun, the court was

informed of the arrangements which had been made. The trial judge then inquired of Thrasher to determine whether he was aware of the arrangement and if he was consenting to it. Thrasher stated his consent and also acknowledged that he was aware that his attorney might not return until later in the week. (Tr. 5). A similar inquiry was required as to another defendant whose attorney was also on trial elsewhere.

An examination of the trial record fails to disclose any prejudice to the defendant's case as a result of this arrangement. Thrasher was at all times represented by counsel. When his retained counsel returned it appears that he was fully familiar with the record and was therefore able to cross-examine fully and effectively. Apparently he maintained contact with his replacement and had been provided with the transcript of the proceedings he had missed. (Tr.48).

2. The government's introduction of a prior statement consistent with the trial testimony of its chief witness.

During cross-examination of Donald James, the government's principal witness, it was established that James had testified before a federal grand jury on January 24, 1973. When asked about the April, 1971 transfer of heroin to Bernhardt, James told the grand jury that two persons other than Richard Thrasher had supplied it. This testimony directly contradicted James' trial testimony which had been to the effect that Thrasher had been the heroin supplier in that transaction. (Tr. 983).

On redirect examination the government attempted to show that in May, 1972, James had been debriefed by government agents. During the course of that interview James had stated that the package containing the heroin had been

supplied by Richard Thrasher. The appellant's objection to the introduction of this testimony was overruled on the ground that this version demonstrated a prior consistent statement admissible to meet the claim that James' trial testimony constituted a recent fabrication. (Tr.1235-1237).

When a prior statement, inconsistent with a witness' trial testimony, has been introduced, it is permissible to rehabilitate that witness through the introduction of statements made at a prior time when there was no motive to falsify, which are consistent with the trial testimony or which may be used to explain away the differences. Copes v. United States, 345 F.2d 723, Warrick v. Brode, 428 F.2d 699, United States v. Stamey, 423 F.2d 1223, United States v. Franzese, 392 F.2d 954.

It appears, therefore, that the trial court's ruling was correct.

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues in this case which might be raised for this Court's review. Accordingly, an order should be entered relieving Stanley Schimmel as counsel for appellant Richard Thrasher on this appeal.



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U.S. ATTORNEY

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